A

Bar Council v Cecil Wilbert Mohanaraj Abraham

B HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO WA-17D-15–04 OF 2016
HANIPAH FARIKULLAH J
30 APRIL 2017

C *Legal Profession — Disciplinary board — Appeal against decision of disciplinary board — Appellant filed complaint against respondent — Complaint involved allegation of fact whether respondent drafted second statutory declaration ('SD2') of one Balasubramaniam a/l Perumal — Whether respondent drafted SD2 — Whether court should interfere with finding of facts by disciplinary board*

D

This was an appeal by the Bar Council ('the appellant') against the decision of the Advocates and Solicitors Disciplinary Board ('the DB') which agreed with the findings of fact and the recommendations of the Disciplinary Committee ('the DC') and dismissed the appellant's alleged complaint dated 4 April 2013. The said complaint involved an allegation of fact, namely whether the respondent drafted or was responsible for or involved in the drafting of the second statutory declaration affirmed by one Balasubramaniam a/l Perumal ('Bala') on 4 July 2008 ('SD2'). SD2 was affirmed by Bala to withdraw his earlier statutory declaration affirmed on 1 July 2008 ('SD1'). In support of their submission, the appellant relied on direct evidence as followed: (a) SD2 was in existence and Bala had executed it and it was witnessed by a commissioner for oaths, Zainal Abidin bin Muhayat; (b) SD2 retracted all negative material statements in SD1 relating to the Prime Minister, Dato' Seri Najib Tun Razak; (c) Bala executed SD2 without knowing who prepared or had been involved with its preparation; and (d) Bala had executed SD1, and SD1 had been prepared by one Americk on his instructions. The appellant also relied on circumstantial evidence led by one Tommy Thomas who had testified that during a function at Renaissance Hotel, the respondent had confirmed that he had drafted SD2.

H

Held, dismissing the appeal with no order as to costs:

(1) It is trite law that an appellate court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary duty of evaluation of the evidence (see para 13).

I

(2) Based on the record on the facts of the present case, the issue of credibility of witnesses was paramount. There was no contemporaneous document that falls to be considered. The appeal that had been brought was brought against the findings of the DC and the DB which had to do solely with

the credibility of witnesses on disputed matters of fact. In matters of professional discipline, the profession itself and its members are the best judge of what are the standards that the members of that profession must adhere to. The courts of law do not readily interfere with what the professions sees or does not see as misconduct. Authorities have also shown that the courts are slow to interfere with findings of a disciplinary authority. Further, in the present case, it was clear that none of the direct evidence pointed to the respondent having drafted or being involved in the drafting of SD2. Therefore, there was no reason for the court to interfere with the decision of the DC and DB (see paras 14–17 & 21).

[Bahasa Malaysia summary

Ini adalah rayuan oleh Majlis Peguam ('perayu') terhadap keputusan Lembaga Tatatertib Peguambela dan Peguamcara ('LT') yang mana bersetuju dengan dapatan fakta dan cadangan-cadangan Jawatankuasa Tatatertib ('JT') dan menolak aduan yang didakwa oleh perayu bertarikh 4 April 2013. Aduan tersebut melibatkan dakwaan fakta, iaitu sama ada responden mendraf atau bertanggungjawab untuk atau terlibat dalam mendraf perisytiharan statutori kedua yang disahkan oleh seorang yang bernama Balasubramaniam a/l Perumal ('Bala') pada 4 Julai 2008 ('SD2'). SD2 disahkan oleh Bala untuk menarik balik periystiharan statutorinya yang terdahulu yang disahkan pada 1 Julai 2008 ('SD1'). Dalam menyokong penghujahan mereka, perayu bergantung ke atas keterangan langsung seperti berikut: (a) SD2 adalah wujud dan Bala telah melaksanakannya dan ia disaksikan oleh pesuruhjaya sumpah, Zainal Abidin bin Muhayat; (b) SD2 menarik balik kesemua pernyataan material negatif di dalam SD1 berkaitan Perdana Menteri, Dato' Seri Najib Tun Razak; (c) Bala melaksanakan SD2 tanpa mengetahui siapa yang menyediakan atau telah terlibat dengan penyediaannya; dan (d) Bala telah melaksanakan SD1, dan SD1 telah disediakan oleh seorang yang bernama Americk atas arahannya. Perayu juga bergantung ke atas keterangan keadaan yang dikemukakan oleh seorang yang bernama Tommy Thomas yang telah memberi keterangan bahawa semasa majlis di Hotel Renaissance, responden telah mengesahkan bahawa dia telah mendraf SD2.

Diputuskan, menolak rayuan tanpa perintah terhadap kos:

(1) Adalah undang-undang nyata bahawa mahkamah rayuan tidak akan campur tangan dengan dapatan fakta yang dicapai oleh mahkamah permulaan yang mana undang-undang mengamanahkan tugas utama penilaian keterangan (lihat perenggan 13).

(2) Berdasarkan rekod atas fakta kes ini, isu kredibiliti saksi-saksi adalah paling utama. Tidak terdapat dokumen semasa yang terdapat untuk dipertimbangkan. Rayuan yang dikemukakan adalah dibawa terhadap dapatan JT dan LT yang mana menilai kredibiliti saksi-saksi atas perkara fakta yang dipertikaikan. Dalam perkara tatatertib profesional, profesyen

itu sendiri dan ahli-ahlinya adalah hakim yang terbaik terhadap standard apa yang ahli-ahli profesyen tersebut patut patuhi. Mahkamah undang-undang tidak dengan sengaja campur tangan dengan apa yang dilihat oleh profesyen atau tidak dilihat sebagai salah laku. Autoriti-autoriti juga telah menunjukkan bahawa mahkamah-mahkamah adalah perlahan untuk campur tangan dengan dapatan pihak berkuasa tatatertib. Selanjutnya, dalam kes ini, ia adalah jelas bahawa tidak satupun keterangan langsung tersebut menunjuk kepada responden setelah mendraf atau terlibat dalam mendraf SD2 tersebut. Oleh itu, tidak terdapat sebab untuk mahkamah campur tangan dengan keputusan JT dan LT tersebut (lihat perenggan 14–17 & 21).]

Notes

For cases on appeal against decision of disciplinary board, see 9 *Mallal's Digest* (5th Ed, 2015) paras 1512–1513.

Cases referred to

Bolton v Law Society [1994] 1 WLR 512, CA (refd)
Chan Yiew Hock v Koh Hong Toong & Anor; Majlis Peguam (Intervener) [2011] 4 CLJ 160, HC (refd)
Gana Muthusamy v LM Ong & Co [1998] 3 MLJ 341; [1998] 4 CLJ 878, CA (refd)
MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd [2016] 2 MLJ 428, CA (refd)
Marzaini bte Zainuddin v Majlis Peguam Negara [2007] 8 MLJ 697, HC (refd)
Ng Hock Cheng v Pengarah Am Penjara & Ors [1998] 1 MLJ 153, FC (refd)
Rokiah binti Mhd Noor v Menteri Perdagangan Dalam Negeri, Koperasi & Kepenggunaan Malaysia & Ors and another appeal [2016] MLJU 1765, CA (refd)

Bastian Vendargon (Anne Vendargon with him) (Chee Hoe & Assoc) for the applicant.
Rishwant Singh (Shahul Hameed Amirudin with him) (Cecil Abraham & Partners) for the respondent.

Hanipah Farikullah J:

INTRODUCTION

[1] This is an appeal by the Bar Council ('BC') against the decision of the Advocates and Solicitors Disciplinary Board ('DB') which agreed with the findings of fact and the recommendations of the Disciplinary Committee ('DC') and dismissed the BC's alleged complaint dated 4 April 2013 ('the complaint').

THE DECISION APPEALED AGAINST

[2] The complaint involved an allegation of fact, namely: Whether the Respondent drafted *or* was responsible for *or* involved in the drafting of the second statutory declaration affirmed by one Balasubramaniam a/l Perumal ('Bala') on 4 July 2008 ('SD2'). SD2 affirmed by Bala to withdraw his earlier statutory declaration affirmed on 1 July 2008 ('SD1'). The respondent denied the allegation of fact.

[3] After hearing the parties' submissions, the DC recommended to the DB that the complaint be dismissed. Each of the three members of the DC wrote their own grounds. They were unanimous in their decision as to the facts and the law.

[4] In gist, the DB did not interfere with the findings of fact of the DC particularly since issues of credibility of witnesses of fact arose.

ISSUE

[5] As advanced before me, the main ground of challenge for consideration is whether the respondent was 'responsible for' the drafting of SD2.

THE APPELLANT'S SUBMISSION

[6] Learned counsel for the appellant submitted that the respondent never denied the complaint and choose to remain silent and claim privileged communication.

[7] The appellant sets out the alleged direct evidence in support of its allegation that points to the respondent having drafted or being involved in the drafting of SD2 as follows:

(a) SD2 was in existence. Bala executed it and it was witnessed by a commissioner for oaths, Zainal Abidin bin Muhayat;

(b) SD2 retracted all negative material statements in SD1 relating to the Prime Minister, Dato' Seri Najib Tun Razak;

(c) Bala executed the same ('SD2'), without knowing who prepared or had been involved with its preparation; and

(d) Bala had executed SD1, and SD1 had been prepared by Americk on his ('Bala's') instructions.

[8] Further the appellant submitted that the circumstantial evidence was led to prove that it was the respondent who had prepared or was involved in the preparation of SD2 are as follows:

(a) through the evidence of Zulkifli Sulong (CW6), the PAS TV interviewer, SD2 was in existence. Bala executed it and it was witnessed by a commissioner for oaths, Zainal Abidin bin Muhayat;

(b) Deepak was subpoenaed but all attempts to served him failed and the appropriate and relevant affidavits of non-service were placed before the DC;

(c) through Tommy Thomas (CW3), evidence was led that at a function in the Renaissance Hotel, at which the witness and his wife, the respondent and his wife, Dato' Johari Razak and his wife, Mr Lim Chee Wee, Mr Darryl Goon and his wife, were present, the respondent had confirmed that he had drafted SD2, or been involved with its drafting; and

(d) the evidence of the respondent was a total denial of the account of Mr Thomas. His witnesses in support of this were:

(i) Mr Darryl Goon:

Who said that the events as recounted by Thomas did not happen. When crossed on why in his first written response to the appellant on this he said that he could not recall such a thing, he claimed that by 'could not recall' he meant it '*did* not happen'; and

(ii) Mrs Darryl Goon (Ms Foo Yet Ngo):

She stated that she was seated next to the wives during the drinks at the Renaissance Hotel and that 'at no time did she hear' the respondent or his wife raise or discuss SD2 or the respondent's involvement in the matter.
She also stated that she had heard about SD2 and the revelation in the media in December 2012 'in the grapevine'. She had never heard that the preparation of SD2 was attributed to the respondent. All she had heard was Bala's retraction of the earlier SD1. She also said that she never heard about the letter of 14 March 2014 from the appellant's then solicitors to her husband, Mr Goon, and that she had only recently found out about it when her husband told her that he was called to give evidence for the respondent at the disciplinary proceedings.

[9] Learned counsel for the applicant criticised the evidence of the respondent's witness as incredible for the following reasons: **A**

(a) when the appellant asked her husband for written confirmation of the events at the Renaissance Hotel, she claimed he had not spoken to her about it (this although she could have been a material witness, particularly as Mr Goon himself was lead counsel for the respondent). This is not credible at all; **B**

(b) she claimed she had not discussed it with her husband (and that they do not discuss work at home). However, the fact is, lead counsel, Mr Goon, must have known that if her evidence of the events are as she claimed, she would be a material witness. He would have raised this with her, and caused to be prepared, her witness statement; **C**

(c) she claimed to have been called at the eleventh hour by Messrs Zul Rafique & Partners for her statement; and **D**

(d) she was, as was her daughter and husband, involved in many aspects with the respondent for years. She was working in Messrs Shearn Delamore (from 1982–1996) when the respondent was a senior partner there. Her family and the respondent's family meet at Christmas parties at each other's houses. Her daughter chambered with the respondent (who is her master) at Messrs Zul Rafique & Partners at the time. She and her husband had approached the respondent and asked him to take their daughter as his pupil. Loyalties borne out of those relationships for years are an excellent incentive to fail to recall certain events and concluding that they did not happen. **E** **F**

(iii) Mr Lim Chee Wee

Mr Lim Chee Wee testified that the events by Mr Thomas did not happen. He was crossed examined in relation to his letter of reply dated 14 March 2014 to the appellant in relation to these events, where he had clearly stated that he 'does not remember' such events. **G**

The word 'REMEMBER' from the same *Webster's Dictionary* is stated to be synonymous with, inter alia, 'recall', and is said 'may indicate an effortless or unwilled permitting of something held in one's memory to occupy ones attention'. **H**

'Do not remember' is the negative, that one does not have it is one's memory. How did Mr Lim Chee Wee now claim to have it in his memory, after effluxion of time when he did not have it in his memory when he wrote the reply letter to the appellant? Incredible. Inherently improbable. **I**

The simplest written reply would have been to say 'I can

confirm that it did not happen'.

Mr Lim Chee Wee had also taken on a stance expressed in the media, that he considered Deepak Jaikishan to be a person 'whose own background was a cause for concern' when he was President of the Malaysian Bar. This resulted in Deepak stating in the media that he would not cooperate with the Bar Council in this matter as long as Mr Lim remained its President.

It must be recalled that during the Renaissance Hotel drinks on 14 December 2013, Lim Chee Wee was President of the Bar. As President, Mr Lim was close to the respondent and as confirmed in cross, had often turned to him for assistance.

Mr Lim confirmed that whilst he was President, no complaint was lodged against the respondent. He gave no reason for this failure to lodge a complaint against the respondent. It is also relevant to note the contents of Mr Lim Chee Wee's letter of reply to the appellant (specifically to the then solicitors acting for the Bar, LHAG) dated 14 March 2014 wherein he states at the end of his letter 'I thank you again for advising and acting for the Bar Council in this difficult and unpleasant matter'. Mr Lim agreed that there were around 500 complaints a year against members of the Bar and quite obviously as President, he would have signed many complaint letters against quite a number of lawyers. He never found these other complaints 'difficult and unpleasant' unlike the complaint against the respondent;

(e) the respondent's evidence was just a denial of any involvement with the drafting of SD2. However, this assertion and testimony of denial of involvement flies in the face of contemporary documentary evidence;

(f) the veracity of the respondent's oral evidence when tested by reference or against the contemporary documentary evidence, will be submit result in his oral testimony having to be rejected; and

(g) socks' evidence that certain express admissions/confessions were not made by the respondent to Americk, was accepted as 'technically correct' by Americk. However, Americk clearly produced contemporaneous documents to support his version of his evidence (screen shots/captures of text messages, emails outlining the events which Sock did not reply to or deny).

[10] On the contrary, learned counsel for the respondent asserted to the court that there are compelling reasons for the court not to interference with the decision of the DB.

[11] Learned counsel for the respondent submitted that it is trite law that an appellate court will not readily interfere with the findings of fact arrived by the court of first instance to which the law entrusts the primary duty of evaluation of the evidence.

[12] In support of his submission, learned counsel for the respondent relied on the Court of Appeal decision in *MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd* [2016] 2 MLJ 428 where the court held as follows:

> [8] The instances where an appellate court will intervene are succinctly set out in the recent English Supreme Court case of *Henderson v Foxworth Investments Limited and Another* [2014] UKSC 41 where Lord Reid summarised the position thus at para 67 of his judgment: It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified.
>
> [9] In *Carlyle v Royal Bank of Scotland Plc* [2015] UKSC 13 the UK Supreme Court explained the rationale underlying appellate intervention thus: The rationale of the legal requirement of appellate restraint on issues of fact is not just the advantage which the first instance judge has in assessing the credibility of witnesses. It is the first instance judge who is assigned the task of determining the facts, not the appeal court. The reopening of all questions of fact for redetermination on appeal would expose parties to great cost and divert judicial resources for what would often be negligible benefit in terms of factual accuracy. It is likely that the judge who has heard the evidence over an extended period will have a great familiarity with the evidence over an extended period will have a great familiarity with the evidence and a deeper insight in reaching conclusions of fact than an appeal court whose perception may be narrowed or even distorted by the focused challenge to particular parts of the evidence ...
>
> ...
>
> [11] More recently in *Merita Merchant Bank Singapore Ltd v Dewan Bahasa Dan Pustaka* [2014] MLJU 1807; [2014] 9 CLJ 1064, Raus Sharif (President of the Court of Appeal) opined as follows in relation to the powers of the appellate court: [45] It is trite law that an appellate court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary duty of evaluation of the evidence. However, the appellate court is under a duty to intervene in a case where the trial court has so fundamentally misdirected itself. In our judgment we find that there was insufficient judicial appreciation by the learned trial judge of the pleadings and contemporaneous evidence in the instant case when she allowed Merita's claim. Such erroneous finding warranted appellate interference which the Court of Appeal rightfully done so, and we have no reason to disagree. We agree with the Court of Appeal in finding that the learned trial judge erred in finding ...
>
> ...

A [14] The requirement for the trial judge to have come to a finding which was 'plainly wrong' before an appellate court may intervene is therefore well entrenched in our appellate philosophy and practice. In *Henderson v Foxworth Investments Ltd and another* (above) Lord Reed considered the meaning to be accorded to the phrase 'plainly wrong': ... there may be some value in considering the meaning of that B phrase. There is a risk that it may be misunderstood. The adverb 'plainly' does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that C no reasonable judge could have reached.

[15] This is a point of some importance because it underscores the rationale that the appellate court is not a liberty to reverse or interfere in the finding of a trial judge even if the appellate court is clearly of the view that it would not have reached the conclusion the trial judge did on the evidence on record before it. It requires D something more. The requisite or correct standard to be applied is that no reasonable judge, on the evidence on record, could have reached the conclusion of the trial judge. In other words, so long as the findings of the trial judge are plausible on the evidence on record, there is no room for interference merely on the grounds that the appellate court forms a different opinion on the same evidence.

E [16] There is, however, little room for variation in the application of the principle of intervention when the trial judge is 'plainly wrong'. Appellate courts ought to be consistent in ensuring that appellate intervention only comes about when a trial judge reaches a conclusion which no reasonable judge could have reached. A lack of such consistency in approach would give rise to considerable uncertainty in the practice and progress of litigation. Litigants through their counsel should be able to F assess with some degree of certainty, on clear and distinctly applied principles of law, whether a judgment obtained at first instance is likely to be overturned or not. This is only possible if there is a consistent application of the 'plainly wrong' principle underlying appellate intervention.

G [17] The obverse or counterpart to the requirement for appellate restraint in dealing with findings of fact by the trial judge is the fundamental requirement that the judgment of first instance does in fact amount to a comprehensive and cohesive determination of the material matters comprising the subject matter of dispute before the trial judge. This requires the trial judge to undertake a full evaluation of the evidence and issues placed before the court. A first instance judgment is open to H challenge when it fails to address or wholly ignores material evidence or issues placed before it, or when bald findings of fact are made with no reasoning or evidence to substantiate such findings. Equally errors of law, a clear misunderstanding of relevant evidence and such clearly identifiable errors will all contribute towards a decision that would be considered to be 'plainly wrong'.

I [18] Judicial decisions are required to be handed down expeditiously and with minimum delay. However this ought not to compromise the fundamental requirement that trial judges undertake a comprehensive and holistic approach to the evaluation of evidence in reaching their findings at first instance. A failure to consider the entirety of the evidence and material issues, a failure to make findings of fact or the making of bare findings of fact, all allow for appellate intervention.

Apart from the real possibility of a miscarriage of justice, such omissions by a trial judge require the appellate courts to take on the role of first instance judges and review the evidence in its entirety afresh. This in turn amounts to a strain on judicial resources. The importance of a comprehensive consideration of the matte at first instance cannot be sufficiently emphasised. Equally when there has been just such a holistic approach adopted, there should be considerable appellate restraint exercised when reviewing a first instance judgment on appeal.

[13] In the light of the principles cited in the above authorities, it seems to me first that it is trite law that an appellate court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary duty of evaluation of the evidence.

[14] I have carefully perused through the record on the facts of this present case and in my view the issue of credibility of witnesses is paramount. There was no contemporaneous document that falls to be considered. The appeal that has been brought is brought against the findings of the DC and the DB which have to do solely with the credibility of witnesses on disputed matters of fact.

[15] Further, in matters of professional discipline, the profession itself and its members are the best judge of what are the standards that the members of that profession must adhere to. The courts of law do not readily interfere with what the professions sees or does not see as misconduct (see *Gana Muthusamy v LM Ong & Co* [1998] 3 MLJ 341; [1998] 4 CLJ 878, *Marzaini bte Zainuddin v Majlis Peguam Negara* [2007] 8 MLJ 697, *Bolton v Law Society* [1994] 1 WLR 512 and *Chan Yiew Hock v Koh Hong Toong & Anor; Majlis Peguam (Intervener)* [2011] 4 CLJ 160).

[16] Authorities have also shown that the courts are slow to interfere with findings of a disciplinary authority (see the Federal Court's decision in *Ng Hock Cheng v Pengarah Am Penjara & Ors* [1998] 1 MLJ 153 at p 159 and the Court of Appeal's decision in *Rokiah binti Mhd Noor v Menteri Perdagangan Dalam Negeri, Koperasi & Kepenggunaan Malaysia & Ors and another appeal* [2016] MLJU 1765 (judgment dated 2 June 2016).

DIRECT EVIDENCE

[17] I have carefully read and perused the allegation of direct evidence as sets out by the appellant in its written submission and it is clear that none of this allegedly direct evidence points to the respondent having drafted or being involved in the drafting of SD2.

A CIRCUMSTANTIAL EVIDENCE

[18] Circumstantial evidence was led to prove that it was the respondent who had prepared or was involved in the preparation of SD2.

B

[19] Through Tommy Thomas (CW3), evidence was led that at a function in the Renaissance Hotel, at which the witness and his wife, the respondent and his wife, Dato' Johari Razak and his wife, Mr Lim Chee Wee, Mr Darryl Goon and his wife, were present, the respondent had confirmed that he had drafted SD2, or been involved with its drafting.

C

[20] The evidence of the respondent was a total denial of the account of Mr Thomas. His witnesses in support of this were:

D

(a) Mr Darryl Goon:

Who said that the events as recounted by Mr Thomas did not happen. When crossed on why in his first written response to the appellant on this he said that he could not 'RECALL' such a thing, he claimed that by 'could not recall' he meant it 'did not happen'; and

E

(b) Mrs Darryl Goon (Ms Foo Yet Ngo):

She stated that she was seated next to the wives during the drinks at the Renaissance Hotel and that 'at no time did she hear' the respondent or his wife raise or discuss SD2 or the respondent's involvement in the matter.

F

She also stated that she had heard about SD2 and the revelation in the media in December 2012 'in the grapevine'. She had never heard that the preparation of SD2 was attributed to the respondent. All she had heard was Bala's retraction of the earlier SD1. She also said that she never heard about the letter of 14 March 2014 from the appellant's then solicitors to her husband, Mr Goon, and that she had only recently found out about it when her husband told her that he was called to give evidence for the respondent at the disciplinary proceedings.

G

H CONCLUSION

[21] It follows that there is no reason for this court to interfere with the decision of the DC and DB. Accordingly this appeal is dismissed with no order as to costs.

I

Appeal dismissed with no order as to costs.

Reported by Dzulqarnain Ab Fatar